

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: Charles Richard Robb

CHAPTER 13 CASE # 22-02410 JAW

DENISE A. MCLAUGHLIN

Plaintiff

v.

ADV # 22-00004 JAW

CHARLES RICHARD ROBB

Defendant

Memorandum Brief in Support of Motion to Dismiss

Defendant, Charles Robb (“Robb”), provides this Memorandum Brief in support of his Motion to Dismiss as required by Miss. Bankr. L.C. 7012(1) and Miss. Bankr. L.R. 7065-1(3). Robb seeks the dismissal of the Complaint on two grounds (1) failure to properly serve the Complaint, and (2) failure to state a claim for which relief can be granted.

I.Plaintiff failed to properly serve the Complaint

The affirmative defense of failure to properly serve a complaint is in Fed. R. Civ. P. 12(b)(5), which is made applicable to this adversary proceeding through Fed. R. Bankr. Proc. 7012(b). The Plaintiff has failed to properly serve Debtor’s attorney of record, Frank H. Coxwell, as required by Fed. R. Bankr. Proc. 7004(g).

The Plaintiff did not serve the first summons, which was issued on February 14, 2023. They then had the Clerk issue a new summons on March 9, 2023, which was served on March 10, 2023 only to the Debtor and not also the Debtor’s counsel as required by Rule 7004(g). The failure to serve both the debtor and the debtor’s attorney of record as required by the rules, renders the service of only one as insufficient. While the issue of a summons can be corrected, it nevertheless renders the action subject to dismissal.

II.Plaintiff fails to state a claim in which relief can be granted.

Robb also moves the Court to dismiss this Complaint for failure to state a claim for which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6), which is applicable through Fed. R. Bankr. Proc. 7012(b). The Plaintiff filed this Complaint for Non-dischargeability of their claim under 11 U.S.C.

§523(a)(6). The discharge under a Chapter 13 bankruptcy case is commonly referred to as the “super discharge.”

While 11 U.S.C. §523 discussed what debts are excepted from discharge, both Chapter 7 and Chapter 13 have their own code sections regarding discharge. For a Chapter 7 bankruptcy it is 11 U.S.C. §727, which does incorporate all of §523 in §727(b). For Chapter 13 bankruptcy cases, discharge is discussed under 11 U.S.C. §1328, which only incorporates a limited number of §523(a) subsections. Under §1328(a)(2), only subsections (1)(B), (1)(C), (2), (3), (4), (5), (8) or (9) of §523(a) are excepted from discharge in a Chapter 13 bankruptcy. As Plaintiff attempts to claim their debt as excepted from discharge under §523(a)(6), they have failed to state a claim for which relief can be sought through this Chapter 13 bankruptcy.

Conclusion

Plaintiff failed to properly serve the Complaint according to Fed. R. Bankr. Proc. 7004(g), and Plaintiff brings claims that are improper due to the type of bankruptcy Robb, the Defendant, is engaged in. As such, the Defendant asks that the Motion to Dismiss be granted pursuant to Fed. R. Civ. P. 12(b)(5) and (6).

Respectfully submitted,

/s/ Rachel Coxwell

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April 10, 2023

Certificate of Service

I hereby certify that I have this day served via ECF electronic filing and/or United States mail, postage prepaid, a true and correct copy of the above pleading(s) to the following:

Hon. Ed Lawler Jr.

McKay Lawler Franklin & Foreman PLLC

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/s/ Rachel Coxwell

Rachel A. Coxwell

April 10, 2023